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Supreme Court of the United States

OCTOBER TERM—1950

No. 8201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' BRIEF

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INDEX

PAGE

Petitioners' Brief 1

Opinions Below 2

Statement of the Matter Involved 2

How the Court of Appeals Divided 6

Jurisdiction 7

Constitutional Provisions, Statutes and Rules Involved 7

Summary of Argument 9

THE ARGUMENT:

POINT I—The summary conviction and sentencing of the petitioners for criminal contempt without notice, hearing or opportunity to answer or defend, were inconsistent with due process and beyond the power of the accusing judge, as and when certified by him 12

Petitioners were Entitled to a Hearing on the Contempt Charges 12

When the Necessity for Immediate Action Passed, the power of the Trial Judge to Act Summarily, also passed 16

The Tendency Has Been to Restrict the Exercise of the Contempt Power and to Leave Punishment to Regular and Formal Criminal Process 22

POINT II—The contempt certificate shows that the accusing judge punished the Petitioners for "an agreement * * * deliberately entered into in a cold and calculating manner" among other things "to impair my health", the making of which agreement was neither seen nor heard by the judge nor made in his actual presence. He was therefore without power to punish Petitioners under Rule 42(a) as and when he certified the alleged contempt 25

PAGE

A—The accusing judge convicted and punished the petitioners only on the basis of his conclusion in the preamble of the contempt certificate (I R. 17-18) that their conduct was "the result of an agreement between [them] * * * deliberately entered into in a cold and calculating manner" to obstruct the administration of justice and to impair the Judge's health. This "agreement" or "conspiracy" is specifically declared and found by the judge in such preamble and is the gravamen of the contempt adjudication and punishment 25

B—The accusing Judge was without power under Rule 42(a) to impose punishment upon Petitioners without hearing, where the essential element of their offense as found by the Judge was an alleged agreement or conspiracy of tremendous scope or import, which obviously did not take place under the eye of the Judge, and was not within his personal knowledge, thus gained 30

POINT III—The Petitioners were denied due process of law because the accusing Judge had a substantial interest in their conviction and punishment 32

The Possible Effect of these Contempt Judgments upon the Bar and the Right to the Assistance of Counsel 41

Conclusion 44

CASES CITED

	PAGE
Adams ex rel. McCann v. U. S., 317 U. S. 269	9, 11, 12, 36
Amer. Constr. Co. v. Jacksonville, T. & K. Ry. Co., 148 U. S. 372	36
Anderson v. Dunn, 6 Wheat. 204	9, 14, 21, 24
Anonymous, 1 Salk. 396, 91 Eng. Reprint. 343	35
Boundary County, Idaho v. Woldson, 49 F. Supp. 600 (N. D. Idaho)	28
Bridges v. California, 314 U. S. 252	23
Burdeau v. McDowell, 256 U. S. 465	13
Coe v. Armour Fertilizer Works, 237 U. S. 413	13
Cooke v. United States, 267 U. S. 517	10, 11, 13, 15, 17, 21, 30, 37, 38
Cornish v. United States, 299 Fed. 283	37
Craig v. Hecht, 263 U. S. 255	16
Deskins v. State, 62 Cr. 314, 71 P. 2d 502 (Okla. 1937)	24
Doniphan v. Lehman, 179 Fed. 173	32
Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285	13
Ex parte Quirin, 317 U. S. 1, 25	18
Ex parte Redmond, 156 Miss. 582, 126 So. 485 (1930)	24
Ex parte Robinson, 86 U. S. 505	9, 12, 41
Ex parte Terry, 128 U. S. 289	9, 14, 15, 20, 30
Gompers v. United States, 233 U. S. 604	23
Hall, Winston, Gates, Green, 176 F. (2) 78 et seq.	17
Harding v. McCullough, 236 Iowa 556, 19 N. W. (2) 613 (1945)	24
Hill v. Texas, 316 U. S. 400, 406	18
In re Michael, 326 U. S. 224	14, 21, 23, 25
In re Oliver, 333 U. S. 257	9, 10, 12, 13, 14, 16, 30

PAGE

Joint Anti Fascist Refugee Committee v. McGrath, 341 U. S. 123 ..... 9, 12, 13
Jordan v. Massachusetts, 225 U. S. 167 ..... 9, 11, 33

Ludecke v. Watkins, 335 U. S. 160, 173 13

Re MacLeod, 6 Jur. 461 22
McLaughry v. Deming, 186 U. S. 49 36
Moore v. Dempsey, 261 U. S. 86 36

National Surety Corp. v. Williams, 110 F. (2d) 873 28
Nye v. United States, 313 U. S. 33 ..... 11, 23, 24, 41

Oakley v. Aspinwall, 3 N. Y. 547 36
Ownbey v. Morgan, 256 U. S. 94 13

Palko v. State of Connecticut, 302 U. S. 319 13
Pendergast v. United States, 317 U. S. 412 ..... 11, 31

Schmidt v. The United States, 115 Fed. (2) 394 ..... 38, 40
St. Josephs Stockyards Co. v. United States, 298 U. S. 38, 73 24

Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 20, 41
Toledo Newspaper Co. v. United States, 237 Fed. 986 37
Townsend v. Burke, 334 U. S. 736 29
Tumey v. Ohio, 273 U. S. 510 ..... 9, 11, 12, 33, 34, 35, 36

United States v. Gridley, 44 F. (2) 716 19
United States v. Hudson, 7 Cranch. 32 (1812) 9
United States v. Sacher, 182 Fed. (2) 416 2

Windsor v. McVeigh, 93 U. S. 274 ..... 9, 12, 13, 30

RULES AND STATUTES

PAGE

Federal Rules of Criminal Procedure, Rule 42 ..... 3, 8, 9, 11, 18, 25, 30, 32, 37

Statutes

United States Code:
- Title 18, § 401 7
- Title 28, § 1254(1) 7

United States Constitution:
- Fifth Amendment 7, 9, 12
- Sixth Amendment 44
- Fourteenth Amendment 33

MISCELLANEOUS

Bar Bulletin of New York County Lawyers Association, Vol. 9, No. 3 42

Dangle, Contempt (National Lawyers Manual, 1939) 24

Hawkins, 2d Pleas of the Crown 35

Impeachment Trial of Justice Samuel Chase, Baltimore, 1805 44

Lawyer Troubles in Political Trials, 60 Yale L. J. 1 43

Manual for Courts-Martial United States Army (corrected to April 20, 1943) 24

Note: 99 University of Penn. L. Review, 540 43

Summary Contempt: A Sword or a Shield, 2 Stanford Law Review 763 43

Tilden, Samuel J. Hon. 44

Trial of John Peter Zenger, 17 How. St. Tr. 675 43

Whitty, The Hallinan Case, 14 Modern Law Review, 89 (London, January, 1951) 43

Supreme Court of the United States

OCTOBER TERM—1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' BRIEF

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman, and Eugene Dennis seek reversal of so much of a decision of the United States Court of Appeals for the Second Circuit, made April 5, 1950 (III R. 118), as affirmed orders of the United States District Court for the Southern District of New York, entered October 14, 1949 (I R. 11-16), adjudging Petitioners guilty of contempt of court and sentencing them to various terms of imprisonment for alleged misconduct as defense counsel in the recent trial of the eleven leaders of the Communist Party.*

*The record in this case includes the record of the trial in *United States* v. *Dennis et al.*, D. C., Southern District of N. Y., No. C 128-87. We use "D. R." to refer to the *Dennis* record and "R". to refer to other portions of the record in this case. Record references will be preceded by a numeral indicating the volume cited.

Opinions Below

The three judges who heard the appeal to the Court of Appeals each took an independent view of the case, and wrote an opinion. The opinions are reported at 182 Fed. (2) 416, and appear in the record at III R. 1-117.

Statement of the Matter Involved

I

The eleven members of the National Committee of the Communist Party of the United States were tried in the District Court for the Southern District of New York on the charge (I D. R. 4) of conspiring "to organize as the Communist Party of the United States of America, a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence," in violation of Section 3 of the Alien Registration Act of June 28, 1940, 54 Stat. 670-671, commonly known as the Smith Act. *United States* v. *Dennis, et al.*, No. C 128-87 in the Southern District.*

Each Petitioner was counsel for one or more defendants in the *Dennis* trial. They are all attorneys, with the exception of Petitioner Dennis, who was counsel *pro se* during the jury trial (1 R. 19), having been represented by Petitioner McCabe during the preceding jury challenge hearing.

On October 14, 1949, after a nine month's trial, the jury returned a verdict of guilty against all defendants in the

* The case is sometimes referred to (and so in the contempt certificate—1 R. 17) as *United States* v. *Foster*. William Z. Foster, chairman of the Communist Party of the United States, was a named defendant, but his trial was severed because of his illness (1 D. R. 186).

Dennis case and was discharged (I R. 76-80). Immediately thereafter, without notice, hearing, or opportunity for defense, the Trial Judge (Hon. Harold R. Medina) adjudicated Petitioners guilty of contempt of court for conduct which had occurred during the trial (I R. 81-86), and imposed a prison sentence on each Petitioner.

The Judge read excerpts from a contempt certificate (I R. 17-73) which he had theretofore prepared.

The certificate lists forty Specifications on which the Petitioners were found guilty, Specification I being the only Specification on which all six Petitioners were found guilty. Petitioner Sacher was found guilty on 22 other Specifications, Gladstein on 17, Crockett on 8, McCabe on 5, Isserman on 6, and Dennis on 4 (1 R. 18).

Each Petitioner was given an identical concurrent sentence on each specification of which he was convicted. Sacher and Gladstein who had most Specifications, and Dennis, a layman who had the least, were sentenced to six months' imprisonment. Crockett and Isserman were sentenced to four months' imprisonment, and McCabe to thirty day's imprisonment (1 R. 11-16).

The preamble of the contempt certificate reads as follows (1 R. 17-18):

> "In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below were committed in the actual presence of the court and were seen or heard by the court during the trial of the case of *United States of America* v. *Foster, et al.*, C 128-87, which commenced on January 17, 1949.
>
> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, de-

liberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants sate the overthrow of the Government of the United tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below:"

* * * * * * *"

Specification I (1 R. 19-20), on which all Petitioners were found guilty, and which was reversed by the Court of Appeals, embodied a finding by the Judge that the Petitioners (1 R. 19):

"* * * * joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.*, C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advo-

States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities."

Specifications II through XL (1 R. 20-73) refer to courtroom episodes which occurred during the nine months of the *Dennis* trial. One to five of the Petitioners were found guilty on each of these Specifications.

The 39 incidents which Specifications II through XL involve were selected from 7 weeks of the jury challenge hearing and 7 months of the jury trial. The first of these incidents (Specification II, 1 R. 20) occurred on January 21, 1949, nine months before the contempt adjudications. The latest (Specification XL, 1 R. 72, charged against Petitioner Dennis only) occurred on October 4, 1949, ten days before the contempt adjudications. The last incident charged against Petitioner McCabe (Specification XXVII, 1 R. 51) occurred on June 3, 1949; against Isserman (Specification XXXII, 1 R. 57) on August 3, 1949; against Gladstein (Specification XXXV, 1 R. 67) on August 26, 1949; and against Sacher (Specification XXXIX, 1 R. 72) and Crockett (Specification XXXVIII, 1 R. 70) on September 14, 1949—that is, over four months, over two months, a month and a half, a month, and a month before the date of the contempt adjudication.

A number of the incidents went completely unnoticed and unrebuked at the time of occurrence.* Certain others occasioned admonitions, often minor in tenor, at the time of occurrence, which terminated the incidents without indication by the Court that additional punishment was warranted or required.†

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* *Cf.* Specifications II, III, XII, XIII, XV, XVI, XXI, XXIII, XXVI, XXIX, and XL.

† *Cf.* Specifications V, VI, VII, VIII, IX, X, XI, XIV, XVIII, XIX, XX, XXII, XXIV, XXV, XXVII, XXVIII, XXXI, XXXII, XXXIII, XXXV, and XXXIX.

Eleven of the incidents in the contempt certificate (Specifications II through XII) occurred during the jury challenge, which was heard without a jury. There was a recess of six days between the end of the challenge hearing and the beginning of *voir dire*, during which period no action against Petitioners was taken or suggested (see 3 D. R. 2557). There were other short recesses during the trial and before the verdict.

Throughout the *Dennis* trial, the Trial Judge expressed the belief that Petitioners were engaged in some plot against him personally, the conduct of the trial, and the federal judicial system. The existence of this plot, he said, occurred to him as early as the beginning of the second day of testimony on the jury challenge (1 D. R. 465). A few days later, he formally found that the plot existed (2 D. R. 1279), and thereafter he repeated the finding (17 D. R. 13116). There was in addition, the Judge's express declaration, in his certificate, that he was punishing for the conspiracy rather than for the individual acts (I R. 17).

How the Court of Appeals Divided

In the Court of Appeals the Circuit Judges voted as follows:

Judge Augustus N. Hand voted to affirm Specification I. Judge Frank voted to reverse Specification I on the grounds that the Petitioners could not be convicted of the conspiracy found therein except after a hearing before a Judge other than the Trial Judge. Since Judge Clark voted to reverse all the Specifications, the convictions on Specification I were reversed by the Court (I R. 31, 118).

Judges Hand and Frank took the view that Specifications II through XL had a status independent of the conspiracy finding contained in the Preamble and Specification I. They affirmed the convictions on all these specifications except that they voted to reverse on the merits Sacher's convictions on Specifications XV and XVIII (I R. 31, 118).

Judge Clark dissented on the ground that a hearing was required before Petitioners could be convicted and punished for alleged contemptuous conduct which had occurred long before the adjudication; and that such hearing should be before another Judge (I R. 111-117).

Jurisdiction

The jurisdiction of this Court was invoked under 28 U. S. Code, Sec. 1254(1).

Certiorari was denied by order of this Court dated June 4, 1951. Petition for rehearing and certiorari was filed June 15, 1951, and granted on October 22, 1951.

This Court limited review to the following question:

> "Was the charge of contempt, as and when certified, one which the accusing Judge was authorized under Rule 42(a) to determine and punish himself; or was it one to be adjudged and punished under Rule 42(b) only by a Judge other than the accusing one and after notice, hearing, and opportunity to defend?"

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, United States Code, Section 401:

> "Power of Court
>
> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehaviour of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42 of the Federal Rules of Criminal Procedure:

"Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Summary of Argument

The fundamental characteristics of constitutional due process safeguarded under the Fifth Amendment require that persons charged with crime should be advised of the charges against them; have reasonable opportunity to meet them by way of defense; have the right to representation by counsel; and that the trial or hearing be had before an impartial judge. (*In re Oliver*, 333 U. S. 257, 278; *Ex parte Robinson*, 86 U. S. 505, 513; 19 Wall. 505; *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Tumey* v. *Ohio*, 273 U. S. 510; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275.)

I. The constitutional course of due process requires that conviction and sentence come only after hearing upon announced charges and full opportunity to the accused to defend themselves.

There is only one, narrow exception to these due process requirements—contempt of court. It includes only charges of misconduct, in open court, in the sight and hearing of the judge, which disturbs the court's business and where immediate punishment is necessary to prevent demoralization of the court's authority (*Ex parte Terry*, 128 U. S. 289). The Federal Rules of Criminal Procedure recognize this extraordinary exception in Rule 42(a). Absent the extraordinary occasion, Rule 42(b) preserves the constitutional safeguards of notice and hearing before punishment.

The power to punish summarily—without notice, hearing or opportunity to defend is a creature of necessity. It exists only because it is indispensable to the maintenance at all times of the dignity and authority of the court (*U. S.* v. *Hudson*, 7 Cranch 32 (1812); *Anderson* v. *Dunn*, 6 Wheat. 204, 227). In the words of Mr. Chief Justice Taft, the power exists because "to preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical

obstruction or disrespect to the court, when occurring in open court. * * * Such summary vindication of the court's dignity and authority is necessary" (*Cooke* v. *U. S.* 267 U. S. 517, 534). When, however, the Court does not "instantly suppress and punish" conduct and allows the occasion to pass, the justification for denying the requirements of due process does not exist. With the passing of the necessity, the power to punish summarily which is rooted in the necessity and exists only so long as the necessity exists, must also pass (*In re Oliver*, 333 U. S. 257).

The present case presents a unique judgment of summary contempt for which there is no precedent.

The trial was not disrupted; it proceeded to an orderly conclusion. All the incidents charged against the Petitioners had occurred in a more or less distant past—the first, almost nine months before the Judge's contempt certificate was announced on October 14, 1949, the last, ten days before that date. The Judge passed each occasion by without summary action and thereby decided not to take action. When the occasion and the need for the summary action passed, the power of the Judge to act also passed. Summary punishment for contempt was not a right of the Judge, the exercise of which he could postpone. Having failed to act "at once", "instantly" or "immediately", on each occasion, there was no "necessity" for the exercise of the extraordinary, arbitrary power, and the usual processes of notice and hearing were required.

II. The accusing Judge convicted and punished the Petitioners only on the basis of his conclusion in the preamble of the contempt certificate (I R. 17-18) that their conduct was "the result of an agreement between [them] * * * deliberately entered into in a cold and calculating manner" to obstruct the administration of justice and to impair the Judge's health. This "agreement" or "conspiracy" is the gravamen of the contempt adjudication and punishment. The making of such agreement was neither seen nor heard

by the Judge, nor made in his actual presence. He was therefore without power under Rule 42(a) to punish Petitioners as and when he certified the alleged contempt (Cooke v. U. S. 267 U. S. 517; Pendergast v. U. S. 317 U. S. 412; Nye v. U. S. 313 U. S. 33).

III. The constitutional course of due process requires not only that conviction and sentence come after notice, hearing and opportunity to defend, but it also requires that the hearing proceed before an impartial judge (*Tumey* v. *Ohio*, 273 U. S. 510, 532; see also *Jordan* v. *Massachusetts*, 225 U. S. 167). The contempt power under Rule 42(a), is no exception to this requirement of due process. A Judge "must have no interest other than the pursuit of justice" (*Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275). He cannot be both accuser and judge in the same cause. The contempt certificate clearly shows that the trial judge's conviction and punishment of the Petitioners rested, in large part, on his belief and finding that the Petitioners had entered into a conspiracy to impair his health. To the extent that the Trial Judge responded to such beliefs, reactions and events, and formed the conviction that Petitioners had entered into a conspiracy to impair his health, as he declared in his certificate, he was clearly acting as a Judge in his own cause; and his interest therein was such as to render any judgment he might make devoid of due process.

In cases where due process is not involved, Rule 42(b) requires that "if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

This Court enunciated this as a sound policy to guide the courts in its decision in *Cooke* v. *U. S.*, 267 U. S. 517. The Rule formalizes and embodies this policy. Thus contempt proceedings are sought to be put, "as far as possible beyond the reach of even unjust adverse criticism."

THE ARGUMENT

POINT I

The summary conviction and sentencing of the petitioners for criminal contempt without notice, hearing or opportunity to answer or defend, were inconsistent with due process and beyond the power of the accusing judge, as and when certified by him.

The fundamental characteristics of constitutional due process safeguarded under the Fifth Amendment required that the Petitioners should be advised of the charges against them; have reasonable opportunity to meet them by way of defense; have the right to representation by counsel; and that the trial or hearing be had before an impartial judge. (*In re Oliver*, 333 U. S. 257, 278; *Ex parte Robinson*, 86 U. S. 505, 513, 19 Wall. 505; *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Tumey* v. *Ohio*, 273 U. S. 510; *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275.)

Petitioners were Entitled to a Hearing on the Contempt Charges

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."
>
> (*In re Oliver*, 333 U. S. 257, 278.)

> "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."
>
> (*Ex parte Robinson*, 86 U. S. 505, 19 Wall. 505, at 513.)

"A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277).

"Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that 'in the development of our liberty insistence upon procedural regularity has been a large factor'. Burdeau v. McDowell, 256 U. S. 465, 477 (dissenting). It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.' In re Oliver, 333 U. S. 257, 273. 'The hearing, moreover, must be a real one, not a sham or a pretense.' Palko v. State of Connecticut, 302 U. S. 319, 327. Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e.g., Coe v. Armour Fertilizer Works, 237 U. S. 413. *Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated.* Ownbey v. Morgan, 256 U. S. 94; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285; see Cooke v. United States, 267 U. S. 517, 536." (Italics added.)

(*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, at p. 164, concurring opinion of Mr. Justice Frankfurter.*)

The power to punish for direct contempt of Court represents the single, extraordinary, exception in the entire body of our jurisprudence, to the otherwise universal application of this principle. And precisely because it is an

* In his separate concurring opinion (at p. 143) Mr. Justice Black declared: "I agree with Mr. Justice FRANKFURTER that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and fair hearing. My views previously expressed under similar circumstances are relevant here. E.g., dissenting opinion in *Ludecke* v. *Watkins*, 335 U. S. 160, 173, and see *In re Oliver*, 333 U. S. 257.

arbitrary * power, a power that is alien to our traditions and foreign to the very thesis of our governmental structure, its scope has been narrowly confined. This Court has repeatedly indicated its alertness to the danger of those abuses and usurpations which flow from the exercise of so arbitrary a power. It has, accordingly, narrowly circumscribed the area in which it will countenance such exercise.

The nature of the exception, and the rigid limitation upon its application were reviewed by this Court in *In re Oliver*, 333 U. S. 257 (at pp. 274-275):

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 128 U. S. 289, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances *a judge has power to punish an offender at once*, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by *immediate punishment*. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, *and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise*. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat. 204, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id., at p. 231 of 6 Wheat. And see in re Michael, 326 U. S. 224, 227.

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* So characterized by this Court in *Ex parte Terry*, 128 U. S. 289.

"That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards even in contempt cases, was spelled out with emphatic language in Cooke v. United States, 267 U. S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. *Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'* Id., at p. 536 of 267 U. S.

"Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and *where immediate punishment is essential to prevent demoralization of the court's authority * * * before the public.*" (Italics added.)

It is within the framework of these principles as enunciated by this Court that the present case must be examined.

This case presents, as Judge Clark pointed out below (III R. 113), "a unique judgment of summary contempt." For the first time in American history all of the defense counsel in an important and extraordinary criminal trial have been sentenced to substantial terms of imprisonment for allegedly contemptuous courtroom conduct.

They were sentenced without a hearing, long after the events had occurred, and when there was no occasion for the Court to act "at once", "instantly" or "immediately" to prevent "demoralization of its authority" or "vindication of its dignity." The episodes, on which these convictions without hearing have been sustained, were combed out of a nine months record, and in the culling process the incidents were endowed in the certificate with a significance and quality which were not contemporaneously considered to be present. The punishment was imposed on Petitioners without a hearing by a Judge who obviously considered them his personal enemies, who had manifested great bitterness toward them, who had clashed with them throughout a long, hard-fought trial, and who had expressed a conviction that they had conspired to impair his health, to discredit him as a judge, and to subvert the judicial system.

This extension of the power to punish for contempt without hearing raises important fundamental issues. Here if ever the "right to be heard in open court before one is condemned" has been "whittled away under the guise" of prevention of "demoralization of the court's authority" (*Re Oliver*, 333 U. S. 257, 275, 278).

When the Necessity for Immediate Action Passed, the Power of the Trial Judge to Act Summarily, also Passed.

In referring to the contempt statute, Mr. Justice Holmes said (in his dissenting opinion in *Craig* v. *Hecht*, 263 U. S. 255, at p. 281), that the exercise of the contempt power should always "be treated as a question of jurisdiction."

He declared that "the statute puts it as a matter of power." Although Mr. Justice Holmes was writing in a case of contempt by publication, his statements as to "jurisdiction" and "power" are equally applicable here. He said: "it seems to me that the statute on its face principally limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work. But wherever the line may be drawn, it is a jurisdictional line."

The Judge in this case did not act immediately upon the occasion of any incident.*

By passing each occasion by without action, the Trial Judge did not find the necessity for "immediate punishment" in this case—the necessity which is the sine qua non of the power to punish without notice and hearing. When the Court inflicted the punishment, without notice and hearing, there was no present disturbance which called for immediate removal. "Immediate punishment" was *not* essential "to prevent demoralization of the Court's authority." There was no "need for immediate penal vindication of the dignity of the Court", which required dispensing with every shred of constitutional due process.

There is not the slightest suggestion of a reason why, even if the Judge considered the Petitioners guilty of contempt, the due process safeguards embodied in Rule 42(b) could not have been employed on the date when he undertook to act against Petitioners. Is it true to say that at that moment there was something which, "if not instantly suppressed and punished, demoralization of the Court's authority would follow?" (*cf. Cooke* case, *supra*, p. 539). It does not appear how, if the hearing called for under the rule had been granted, the authority of the Court would have suffered or how justice would have been obstructed. We cannot find anywhere in this record

* The judge did not hesitate to "punish immediately" on other occasions during the course of the trial (vide *Hall, Winston, Gates, Green* Proceedings, 176 F. 2nd 78 et seq. (CCA 2, 1949)).

the suggestion of a reason why a lesser power would not have been adequate to the maintenance of the dignity of the Court. Indeed, under these circumstances, the maintenance of such dignity surely called for the application of at least the minimal procedural standards set forth in Rule 42(b).

The answers given by Judges Augustus Hand and Frank do not accord with accepted concepts of due process.

Judge Hand said that the conduct of the Petitioners "merited summary punishment" (III R. p. 29). Judge Frank offered equally indefensible rationales for doing away with the elementary requirements of due process. He considered the Petitioners' crime so enormous that he concluded that "not to punish such behaviour summarily, but, instead, to require a long trial of these lawyers might well be to encourage that sort of behaviour" (III R. p. 91). Furthermore, the lawyers were not entitled to a hearing because their conduct "if copied by lawyers in other cases, would almost surely disrupt trials" (III R. p. 92). Judge Frank concluded that it was necessary to forego the civil liberties of the Petitioners. He declared that "the protection of civil liberties calls for sustaining the contempt judgments in this case" (III R. p. 92). What is said by Judge Frank thereafter is intended to provide a legal justification for his determination to punish the Petitioners because their conduct was as distasteful to him as it was to the Trial Judge.

A person's right to due process, and a judge's power to punish an alleged contempt long after its commission without satisfying the requirement of due process, do not depend on the quality of the defendant's conduct. Due process is not a reward for the good, and the denial of it may not be used as punishment for the guilty. (*Ex parte Quirin*, 317 U. S. 1, 25; *Hill* v. *Texas*, 316 U. S. 400, 406.) Indeed, due process is constitutionally enshrined for all because of the belief that only through due process may the truth be found, and justice be done.

Judge Clark framed the question sharply and directly. In his opinion, he said that whatever reaction one might have to the conduct of the Petitioners as charged by the Judge does not justify imprisonment without hearing. His formulation does aptly frame the issue as follows:

> "* * * If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied. For the person accused of a criminal contempt, like any other accused, is entitled to the opportunity to exculpate himself, so far as his evidence permits, before being sentenced to imprisonment. Hence the immediate issue in this case is not at all as between appropriate punishment and complete immunity from penalty; it is as to the manner in which the question of guilt or punishment can be legally and appropriately tried, or more broadly the course which will best preserve at once the rights of the accused and the dignity of the law in accordance with the highest standards of American justice" (III R. pp. 111-112).

A Judge need not exercise the power to punish summarily. If he decides to forego the exercise of the power—even in a situation in which it *might* have been exercised—if he decides to delay the imposition of punishment whatever the reason that may impel him to do so, he must accept the corollary to his determination in favor of delay. Having decided not to proceed by way of infliction of "instant" punishment, he has renounced the foundation for the denial in any case of those rights which inhere in due process, and he is required thereafter to impose punishment for the offense, if any power remains to do so, only after the notice and hearing prescribed by law (e.g. *United States* v. *Gridley*, 44 F. (2d) 716, 717 (CCA 6, 1930)). This

very proposition was given explicit recognition in the *Terry* case. After having ruled that it could not look behind the finding that Terry had been guilty of contempt under the eye of the Court, since the case was before it not on appeal but on application for a writ of habeas corpus, this Court declared:

> "It was within the discretion of that Court, whose dignity he had insulted and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed *at once* to punish him *or* postpone action until he was arrested upon process, brought back into its presence, *and permitted to make defense*" (at p. 312). (Italics added.)

In the present case, the alleged contemptuous acts had occurred long before (some as long as nine months before) the contempt adjudication and sentencing. The trial in which the acts had occurred had come to an end. There was no necessity which required or warranted dispensing with a hearing. The punishment imposed was therefore not "a present protection of the court" but "postponed retribution".* Accordingly, there was not present the only factor which permits dispensing with a hearing. Thus the conviction of Petitioners without a hearing was a flagrant violation of due process.

It is no answer that the Court could have punished for the acts when they occurred, and hence that Petitioners were not harmed by postponement of adjudication. Judge Clark met this argument by reference to the need for adhering to the basic concepts of due process (III R. 115). He said:

> "Again it has been suggested that since the judge could have acted summarily at the time of each incident he should not lose the right by delaying to save the trial. But if the law is correctly stated above, this is a begging of the question. The matter is one not of

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* See dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, at p. 423.

> honoring the judge's patience, but of following the course set by law for the circumstances as they actually exist. Summary punishment for contempt is not a right of the judge, the exercise of which he may postpone. It is an extraordinary exception to due process of law, justified only by the urgent needs of the moment. When the need for this drastic action passes, the power so to act also passes; and consonant with the long-standing mandate to use 'the least possible power adequate to the end proposed', *In re Michael*, 326 U. S. 224, 227; *Anderson* v. *Dunn*, 6 Wheat. 204, 19 U. S. 204, the more orderly processes of notice and hearing must be employed."

Other answers were suggested below: that this Court by the words "immediate penal vindication of the dignity of the Court" (*Cooke* case, p. 536) meant, as suggested by Judge Hand, "as speedy vindication as was practicable under the circumstances" (III R. 28) or that "the punishment should follow the acts of contempt with reasonable promptitude; but that the degree of promptitude depends upon the particular facts of each case" (III R. 29).

"The need for immediate penal vindication of the dignity of the court created" the exception "to the usual and ordinarily indispensable hearing before judgment constituting due process," this Court declared in the *Cooke* case (at p. 536); therefore, it cannot be said that any postponed action—whether "as speedy * * * as * * * practicable" or "with reasonable promptitude" meets the rigid test that "unless such an open threat to the orderly procedure of the Court and such a flagrant defiance of the person and presence of the judge * * * is not *instantly suppressed and punished*, demoralization of the Court's authority will follow" (id.). By dictionary definition "instantly" means "with urgency; pressingly; without the least delay; at once." "Instantly" retains the implication of absolutely immediate sequence. Either of the alternatives suggested by Judge Hand contemplates delay.

Such answers make the cardinal error of expanding by "construction" a limited exception to the point where it destroys the rule. What harmed Petitioners was the absence of a hearing. This was an injury they might have had to endure if and when it was required by the need for "immediate" vindication of the Court's authority. But at any other time Petitioners were protected against such an injury by ordinary standards of due process.

Furthermore, the postponment of adjudication on each separate occasion harmed Petitioners by resulting in their conviction without hearing on the basis of a view of the incidents involved, which was conditioned by the Judge's conclusion as stated in the preamble that all that happened was the result of a conspiracy. As Judge Clark stated below:

> "If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us." (III R. 115).

The Tendency Has Been to Restrict the Exercise of the Contempt Power and to Leave Punishment to Regular and Formal Criminal Process

Even where its exercise is accompanied by the safeguards of notice and hearing, the fact that it envisages the imposition of criminal sanctions without affording to the accused all of the protections recognized by our system of jurisprudence has led it to be accepted, reluctantly accepted, as a necessary evil. It is in this sprit that Mr. Justice Holmes besought the Courts to avoid its exercise, enjoining them to remember that:

> "The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. Re MacLeod, 6 Jur. 461. Maintenance of their author-

> ity does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these * * * " (*Gompers* v. *U. S.*, 233 U. S. 604 at p. 612).

More than a hundred years ago James H. Peck, the first Judge of the United States District Court of St. Louis was impeached because he presumed to punish for contempt (though after notice and hearing) an attorney who published a criticism of his decision rendered in a trial in which that attorney had appeared before him. Judge Peck was acquitted, but popular revulsion against the use of the contempt power had repercussions which are felt to the present day. Congress passed the Act of March 2, 1831, which sharply restricted the occasions on which the contempt power could be employed.* When a tendency towards its resurgence began to appear, this Court in *Nye* v. *United States* (313 U. S. 33, 61) pulled it up sharply, declaring (at p. 49) that the history of the statutory prescriptions of the various types of offenses relating to misbehaviour before the Courts required "meticulous regard for these separate categories of offenses * * * so that the instances where there is no right to trial by jury will be narrowly restricted."

In *In re Michael*, 326 U. S. 224 (at p. 227), this Court said:

> "Not very long ago we had occasion to point out that the Act of 1831, 4 Stat. 487, from which Sec. 268 of the Judicial Code derives, represented a deliberate Congressional purpose drastically to curtail the range of conduct which Courts could punish as contempt, *Nye* v. *United States*, 313 U. S. 33, 44-48. True, the Act of 1831 carries upon its face the purpose to leave the courts ample power to protect the administration of justice against immediate interruption of its busi-

* The history of the contempt power has been reviewed in several opinions written in this Court; vide *Nye* v. *U. S.*, 313 U. S. 33; also dissenting opinion of Mr. Justice Frankfurter in *Bridges* v. *California*, 314 U. S. 252, 281

> ness. But the references to that Act's history in the Nye case, supra, reveal a Congressional intent to safeguard constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.' *Anderson* v. *Dunn*, 6 Wheat. 204, 231".

If it is important narrowly to limit "the instances where there is no right to trial by jury", what is to be said of the instances in which there is no right to trial at all? With what "meticulous regard" must we scrutinize attempts to deprive persons of their liberty without affording them any hearing whatsoever, in which the "inexorable safeguard" of constitutional due process (Brandeis, J., in *St. Joseph's Stockyards Co.* v. *United States*, 298 U. S. 38, 73) is dispensed with?

In some jurisdictions the entire power has been swept away, and notice and hearing have been legislatively established as prerequisite to punishment even for direct contempt (See *Deskins* v. *State*, 62 Cr. 314, 71 P. 2d 502 (Okla., 1937); *Harding* v. *McCullough*, 236 Iowa 556, 19 N. W. 2d 613 (1945); *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930)). Even courts-martial operating under the rigorous discipline of military law may exercise the power to punish for contempt in the face of the Court (a power granted by the Thirty-Second Article of War) only "after giving the party an opportunity to be heard" (Manual for Courts-Martial United States Army, corrected to April 20, 1943, p. 91).

A careful student of the subject points out that:

> "The trend of the Courts in modern times is that even in direct contempt, there should be proceedings wherein the accused should be formally charged, orally or in writing, with the facts alleged to constitute the contempt and complete specification be given in detail. There should be required a hearing by the Court and proof should be required to establish the guilt of the accused" (Dangle, *Contempt* (1939), p. 206).

As this Court has said (*In re Michael*, 326 U. S. 224, 227):

> "The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature and leave determination of guilt to a judge rather than a jury."

POINT II

The contempt certificate shows that the accusing judge punished the Petitioners for "an agreement * * * deliberately entered into in a cold and calculating manner" among other things "to impair my health", the making of which agreement was neither seen nor heard by the judge nor made in his actual presence. He was therefore without power to punish Petitioners under Rule 42(a) as and when he certified the alleged contempt.

A

The accusing judge convicted and punished the Petitioners only on the basis of his conclusion in the preamble of the contempt certificate (I R. 17-18) that their conduct was "the result of an agreement between [them] * * * deliberately entered into in a cold and calculating manner" to obstruct the administration of justice and to impair the Judge's health. This "agreement" or "conspiracy" is specifically declared and found by the judge in such preamble and is the gravamen of the contempt adjudication and punishment.

The portions of the preamble of the certificate which are relevant and decisive are to be found in the second, third and fourth paragraphs. (I R. 17-18).

> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might

understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below.

The language is all too clear in its meaning to require extended analysis. It is explicit in its declaration that the accusing Judge "would have overlooked or at most merely reprimanded counsel" for the individual acts and statements enumerated in the Specifications, had he regarded them as the result of the heat of controversy or of the zeal of defense. But the Judge concluded that they "were the

result of an *agreement* between these defendants, deliberately entered into in a cold and calculating manner *to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue*" (I R. 17).

After thus stating his conclusion in the second paragraph—that "the acts and statements *to which I am about* to refer were the result of an agreement * * * to do and say these things"—the Judge proceeds in the third paragraph to describe the "acts and statements and conduct" as "a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment" (I R. 18).

The Judge discloses the direct relation between his finding (second paragraph) that "the acts and statements to which I am about to refer were the result of an *agreement* * * * to do and say these things", and his conviction and punishment of Petitioners for said "acts and statements and conduct" when he says in the fourth paragraph (I R. 18):

> "*Accordingly*, I adjudge the following guilty of the several criminal contempts described below:"

Clearly, the Judge made the alleged "agreement between these defendants, deliberately entered into, in a cold and calculating manner to do and say these things", as stated in the preamble to the certificate, the *gravamen* of his contempt adjudication and punishment. To deny this is to deny all meaning and effect to what is undoubtedly the most forceful and unambiguous language in the Court's certificate, and to do violence to the most elementary canons of construction.

In *Boundary County, Idaho* v. *Woldson*, 49 F. Supp. 600 (N. D. Idaho), the Court said at page 603 (aff'd 144 F. (2d) 17; cert. den. 324 U. S. 843 (1944):

> "A judgment or decree must be construed as a whole so as to give effect to every word and part."

See also *National Surety Corporation* v. *Williams*, 110 F. (2d) 873, 876-77 (C. C. A. 8, 1940), cert. den. 311 U. S. 674.

When the explicit language of the certificate is coupled with the severe and identical punishment which the Judge meted out to each of the Petitioners for each of the Specifications on which he convicted him, then it becomes clear beyond all doubt that the "agreement between these defendants deliberately entered into a cold and calculating manner to do and say these things" found in the preamble was the gravamen of the contempt adjudication and punishment.

The certificate contains 40 Specifications. The Judge imposed on each Petitioner a separate and concurrent sentence on each of the Specifications. Thus, each Petitioner received a separate and identical sentence for each Specification on which he was found guilty, to be served concurrently, as follows: Petitioners Sacher, Gladstein and Dennis, 6 months; Petitioners Crockett and Isserman, 4 months; Petitioner McCabe, 30 days. Sacher with a total of 23 incidents against him and Dennis, the non-lawyer, with a total of five, each received an identical sentence of six months.

When the certificate and its Specifications are analyzed, it becomes clear that each Petitioner was punished solely on the basis of the agreement or conspiracy which the Judge found in the preamble, and the extent to which the Judge believed each Petitioner to have participated in the execution of the agreement or conspiracy. Furthermore, except when considered in the context of an alleged agreement or conspiracy, such as was found in the preamble, no Court could regard each Specification of which a Petitioner was found guilty as being deserving of such identical, harsh

punishment.—Hence the analogy to the rule applied in the case of concurrent sentences on separate "counts" in an indictment in a criminal case, is inapplicable. The "agreement" in the preamble is the common denominator of the sentences imposed. The Judge said in so many words that but for his "conclusion" that the acts and statements contained in all Specifications were the "result of an agreement between these defendants, deliberately entered into in a cold and calculating manner to do and say these things" he "would have overlooked [them] or at most merely reprimanded counsel" (I R. 17).

In his dissenting opinion Judge Clark drew this conclusion from his study of the Judge's certificate (III R. 113-14):

> "In justice to the trial judge it must be pointed out that he acted upon a perfectly rational theory, namely, that of a conspiracy to obstruct justice continuing up to the very end. * * *
>
> But the other alternative, that punishment here may be considered visited on the individual acts, involves a dilemma as great. There are not only the practical difficulties of the judge's own statement that he was punishing for the conspiracy rather than for acts which might well be considered as due to the heat of the trial, and of making sense out of his distribution of penalties, except upon his own rationale of conspiracy."

Since the accusing Judge himself said in words that are unmistakable, "that he was punishing for the conspiracy rather than for acts which might well be considered as due to the heat of trial" (as paraphrased by Judge Clark above), no one is free to disregard the words or to ignore the decisional intention they express. For as it is said in *Townsend* v. *Burke*, 334 U. S. 736 (at p. 740):

> "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence * * *.
>
> "* * * Such a result * * * is inconsistent with due process of law, and such a conviction cannot stand" (at p. 741).

B

The accusing Judge was without power under Rule 42(a) to impose punishment upon Petitioners without hearing, where the essential element of their offense as found by the Judge was an alleged agreement or conspiracy of tremendous scope or import, which obviously did not take place under the eye of the Judge and was not within his personal knowledge, thus gained.

Rule 42(a) permits departure from the procedural requirements of subdivision "b" only "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court". But even if the rule were not so specific, this Court has made it clear that the Constitution itself would require at least this minimum to justify dispensing with all its guarantees of due process of law.

Thus, in *In re Terry, supra*, the Court carefully pointed out that an essential prerequisite for departure in contempt cases from the otherwise universal proposition that a sentence rendered without affording the accused an opportunity to be heard "is not a judicial determination of his rights and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277), is that the offensive conduct must be committed in the face of the Court, "under its own eye and within its hearing" (at p. 307). Again, in *Cooke* v. *United States*, *supra* (at p. 536), this Court in reversing the conviction for contempt because an adequate hearing had not been provided, stated that the justification for such an invasion for the prerequisite of due process depended upon the "assumption that the judge saw everything that went on."

In *In re Oliver, supra* (at p. 275), this Court interpreted the holding of the *Cooke* case to be "that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disrupting misconduct must not only occur in the court's immediate presence, but that

the Judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct". Accordingly, the Court concluded that dispensing with notice and hearing in contempt cases was justified "*only * * * where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court.*"

The essential element, the gravamen of the contempt is the agreement as declared in the preamble. But not a single word in the entire certificate shows either that such agreement was made in open court, that the Judge had any personal knowledge of the making of such an agreement, that it was made under his eye, or that it was within the area of his observation.

Two of the Judges below (Frank, C. J. and Clark, C. J.) agreed that on a charge of conspiracy the Petitioners are entitled to a hearing. (Judge Frank's opinion, III R. 94; Judge Clark's opinion, III R. 113-14). Judge Frank recognized that with respect to conspiracy "the agreement itself, if there was one, presumably was made out of court; at any rate, it cannot conclusively be presumed that it was made in the Judge's presence; it is not entirely inconceivable that the inference of a conspiracy could be rebutted by evidence of matters not seen or heard or considered by the Judge" (III R. 94).

In *Pendergast* v. *United States*, 317 U. S. 412, the Court held that a contempt proceeding instituted because of a misrepresentation made by the alleged contemnor to a Federal Court was barred by the Statute of Limitations. The Government in that case contended that since the misrepresentation had been made in pursuance of a fraudulent, illegal conspiracy, the prosecution should be allowed to stand since the conspiracy continued in existence after the particular misrepresentation was made. But this Court held that *the conspiracy could not be charged as the offense* since it *had not been* committed in or near *the presence of the Court*, and punishment therefor could be imposed only

by way of the ordinary processes of criminal law (cf. *Doniphan* v. *Lehman*, 179 Fed. 173, 174 [C. C. D. Ind., 1902]).

In the present case, the essence of the offense charged is the alleged *agreement* among Petitioners—the equivalent of the conspiracy in the *Pendergast* case. If punishable as a contempt at all, the certificate must show that the agreement took place in the sight, hearing and actual presence of the Judge. If it did not take place in open court, it cannot be punished.

Upon what basis, then, can the convictions of the Petitioners under Rule 42(a) be justified?

POINT III

The Petitioners were denied due process of law because the accusing Judge had a substantial interest in their conviction and punishment.

The contempt certificate reveals that the accusing judge had such an interest in the conviction and punishment of the petitioners as to render the same void for lack of due process.

As has already been noted, the accusing judge wrote the following in the preamble to the specifications (1R. 17-18):

> "'By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduc' which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue."

If this language means anything, it must be this: That the conduct charged to the petitioners *can* be regarded merely as the manifestation of excessive zeal in the heat of trial; that the accusing judge *would* have so regarded it and "would have overlooked (it) or at most merely reprimanded counsel," but for his conclusion that it was the result of a conspiracy whose purposes included the ptitioners' impairment of his health.

There was disagreement among the Judges of the Court of Appeals as to whether the accusing judge rested his *conviction* of the petitioners on the conspiracy. There was no disagreement as to his having taken it into account in fixing their *punishment* (Judge Hand's op., III R. 9-10; Judge Frank's op., III R. 95; Judge Clark's op., III R. 114).

When the accusing judge inflicted punishment for what he believed to be a conspiracy among the petitioners to impair his health, he occupied a partisan position which rendered his decision void for lack of due process. For, as this Court said in *Tumey* v. *Ohio*, 273 U. S. 510, 534:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

And at page 532 it said:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict a defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

See also:

Jordan v. *Massachusetts*, 225 U. S. 167.

The question in the *Tumey* case was whether certain statutes of Ohio in providing for the trial by the mayor of the village of one accused of violating the Prohibition Act of the state deprived the accused of due process of law and violated the 14th Amendment to the Federal Constitution,

because of the pecuniary and other interest which those statutes gave the mayor in the result of the trial. The statutes provided that the mayor should receive or retain the amount of his costs in each case over which he presided, in addition to his regular salary, as compensation for hearing such cases; but no fees or costs in such cases were paid him except by the defendant if convicted. The mayor found Tumey guilty of a statutory violation, fined him $100, and imposed $12 costs on him. In reversing this conviction on the ground that it lacked due process of law, Chief Justice Taft writing for a unanimous Court; said at page 532:

> "There are doubtless mayors who would not allow such a consideration as $12.00 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The opinion in the *Tumey* case further shows that interests other than a judge's pecuniary interest in the result of his judgment, will void the judgment for lack of due process of law. Thus the Court held, that apart from the mayor's pecuniary interest in the result of his judgment (which was represented by the $12 costs which he imposed on Tumey), the judgment was void for lack of due process because, in his representative capacity as mayor, he had another interest in convicting defendants, i.e., that which was represented by his municipality's share in the fines he imposed on offenders (pp. 532-534).

Indeed, to support the holding that the mayor's direct pecuniary interest in convicting Tumey rendered his judgment void for lack of due process of law, Chief Jus-

tice Taft referred with obvious approval to holdings that a judge who is the object of personal abuse or assault in the course of a direct contempt in open court should not himself sit in judgment on the contemnor. Thus did Chief Justice Taft write at page 525:

> "There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace. In Hawkins, 2d Pleas of the Crown, Bk. 2, Ch. 8, §§ 68, 69, we find the following:
>
> 'The general rule of law certainly is that justices of the peace ought not to execute their office in their own case (citing Anonymous, 1 Salk. 396, 91 Eng. Reprint, 343); and even in cases where such proceeding seems indispensably necessary, as in being publicly assaulted or personally abused, or their authority otherwise contemned while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender (Stra. 240).'"

The foregoing clearly appears to hold that even a judge, who solely for the vindication of the court's authority and to prevent demoralization thereof before the public, finds it necessary to and does impose instant summary punishment on one who commits a physical assault upon him in open court, is disqualified by interest from doing so. The Court is not, however, required to go that far in sustaining the position of the petitioners in this case. For the accusing judge here did not instantly punish the petitioners, for their alleged conspiracy to "impair my health," out of a felt necessity for the immediate vindication of the court's authority. Indeed, he postponed adjudication *and* punishment for as much as eight months after the notion of conspiracy came into his mind (2 D. R. 1279). Conceivably, the *necessity* for the *immediate* vindication of the court's authority may justify the *instant* summary imposition of punishment even by a judge who, like the accusing judge here "occupies two practically and seriously incon-

sistent positions, one partisan and the other judicial." It may, perhaps, be that in the context of an overriding necessity which, for the immediate vindication of the court's authority, results in instant summary punishment, the accused may be denied not only the right to notice, hearing and opportunity to defend, but the right to an impartial judge as well. But, we submit, it can only be overriding necessity than can conceivably justify denial of what this Court, in the *Tumey* case, spoke of as "the right to have an impartial judge" (p. 535). For, as was said in *Oakley* v. *Aspinwall*, 3 N. Y. 547, 549 (a case that has been cited with approval by this Court in *Amer. Constr. Co.* v. *Jacksonville, T. & K. Ry. Co.*, 148 U. S. 372, 387, and *McClaughry* v. *Deming*, 186 U. S. 49, 67):

> "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. *Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.*" (Emphasis added.)

More recently, in *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, this Court had occasion to say (at p. 275):

> "Certain safeguards are essential to criminal justice The court must be uncoerced, Moore v. Dempsey, 261 U. S. 86, and it must have no interest other than the pursuit of justice, Tumey v. Ohio, 273 U. S. 510."

To summarize: This Court has said that even a small pecuniary interest which might lead a judge "not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law" (*Tumey* v. *Ohio, supra*, at p. 532). Who will say that prison sentences, ranging from one to six months imposed on American lawyers by a Judge who believes them to be engaged in a conspiracy to do him personal harm are more in accord with the requirements of due process than is a hundred dollar

fine imposed by a judge confronted with the prospect of receiving twelve dollars in fees and costs upon imposing such fine..

Absent the question of a denial of due process, Rule 42(b) nevertheless provides that "if the contempt charge involves disrespect to or criticism of a judge that judge is disqualified from proceeding at the trial or hearing except with the defendant's consent."

Rule 42(b) as enacted by this Court deals with situations which are not acute enough to involve a denial of due process by virtue of any interest which the accusing judge may have in the result of the proceeding. The report of the Advisory Committee indictates that in promulgating Rule 42 (b) this Court was formalizing the policy which it had theretofore enunciated in *Cooke* v. *United States*, 267 U. S. 517. In the *Cooke* case this court evinced a concern to put the contempt proceedings "as far as possible, beyond the reach of even unjust adverse criticism" (*Toledo Newspaper Co.* v. *United States*, 237 Fed. 986, 988, cited together with *Cornish* v. *United States*, 299 Fed. 283, 285 in *Cooke* v. *United States*, supra, at p. 539).

In the *Cooke* case the attorney involved had written a letter to the Judge following the return of an unfavorable verdict. The letter made serious charges against the Trial Judge and demanded that he remove himself from further proceedings in the case.

After deciding that it was a case that required a hearing, this Court dealt with the question presented by the circumstances that the contempt charged involved accusations against the Trial Judge.

In the opinion that was written by the Chief Justice, this Court emphasized the need in a case of this character for the accusing judge "to avoid arbitrary or oppressive conclusions" (at p. 539).

This Court said that this rule of caution "is more mandatory where the contempt charged has in it the element of

personal criticism or attack upon the judge" (at p. 539). The observations which the Chief Justice made for this Court with respect to the *Cooke* case are equally applicable here:

> "The case before us is one in which the issue between the Judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows" (at p. 539).

The accusing Judge's statements in the preamble of the contempt certificate clearly warrant the conclusion that the accusing judge had "marked personal feeling", that he was concerned with an interest which made it most difficult for him to "avoid arbitrary or oppressive conclusions." This is reflected by his adjudication and punishment of these Petitioners. The adjudication was without a hearing and opportunity to defend and the punishment involved severe prison sentences with attendant consequences to the professional careers of the attorneys-petitioners.

In *Schmidt* v. *The United States*, 115 Fed. (2) 394, the Circuit Court of Appeals for the Sixth Circuit reversed the conviction of two attorneys for contempt, where it appeared that the judge who punished them was the judge against whom their clients had filed affidavits of bias, to which the attorneys had appended their certificates that the affidavits had been filed in good faith. Although the Trial Judge had struck the affidavits and certificates from the record as insufficient in law, the Court of Appeals held that the District Judge:

> "should not have been required to try the contempt cases, while he was confronted with the affidavits of bias and prejudice to which appellants had appended their certificates of good faith. This is no reflection upon the Judge nor upon any judge so confronted. Even a judge may not put aside the propensities of human nature as easily as he does his robe" (at p. 398).

In the present case there were a series of such motions antedating the commencement of the trial.

On November 4, 1948, several months before the trial began, the defendants in the *Dennis* case filed an affidavit of personal bias and prejudice (17 D. R. 12858-863). The affidavit charged Judge Medina with personal bias and prejudice against each and all of the defendants and in favor of the Government. Quoting at some length from transcripts of court proceedings the affidavit of bias and prejudice declared that "Said statements establish that he [Judge Medina] not only believes affiants to be guilty of the charges made in the indictments, but that he also believes, in the absence of both charge and evidence, that defendants 'want to wait until they get everything set' and that, when that is accomplished, they will commit acts designed to bring about the overthrow and destruction of the government of the United States by force and violence" (id. p. 12,862). The affidavit was supported by certificates of the Petitioners Sacher, Isserman and McCabe. One of the affiants was the Petitioner Dennis (id. pp. 12863-12864). On the next day Judge Medina wrote an opinion striking the affidavit of prejudice (id. pp. 12865-66).

On May 20, 1949, during the course of the trial the Petitioners moved for a mistrial. The papers in support of the motion appear in the record (17 D. R. 13321-13369). The very first ground stated in the notice of motion was "prejudicial remarks and intemperate statements of the court in the presence of the jury thereby preventing a fair trial" (id. p. 13321).

The seventh ground stated was "The attitude of the court towards defendants' counsel throughout the trial created an atmosphere which imperiled the constitutional right of the defendants to be represented by counsel as guaranteed by the Constitution, if it did not entirely deny them this right." The eighth ground declared: "The relationship the court established between the defense counsel and itself was calculated to and actually did, prejudice the jury so as to prevent the rendition of a fair verdict based

exclusively on the evidence." The ninth ground asserted "The judicial misconduct of the trial judge."

The tenth ground was based upon "The prejudice and bias of the trial judge."

Exhibit A annexed to the motion for a mistrial (id. pp. 13,323-29) gives references to the transcript record which deal wholly with incidents designed to support the charges of judicial misconduct, prejudice and bias of the trial judge.

In a motion to withdraw a juror and to declare a mistrial submitted by the Petitioners at the close of the trial (17 D. R. 13,499-13,618) one of the grounds stated in the motion (id. p. 13,521) dealt with the prejudicial misconduct of the trial judge. It was there stated:

> "The Trial Judge has, from the beginning and constantly throughout the trial, in open Court, in the presence of the jury, and when the jury was not present evidenced active bias, prejudice, partiality, temper, rudeness, impatience, sarcasm, disbelief and hostility against and towards the defendants and their counsel, and witnesses and in many essentials abandoned the role of judge to assume the functions of the prosecutor and has affected the jury thereby, in violation of those standards of fairness, decency and judicial propriety and necessary to insure a fair trial before an impartial jury thus depriving defendants of their right under the Fifth and Sixth amendments to the United States Constitution as follows."

Dealing only with the effect of the filing of a motion to disqualify the Judge in the main case, for bias and prejudice, the Court of Appeals in the *Schmidt* case said (at p. 398):

> "We do not adjudge that any unfairness permeated the trial of these cases, but to eliminate the 'chance' that such existed, the judgment should be reversed and the cases remanded for further proceedings before another judge."

Much more of a "chance" that the accusing judge was influenced by these motions and by his conviction that the

Petitioners had conspired to impair his health exists in the present case to require that the Judge's charges should be heard before another Judge.

In the *Toledo Newspaper Co.* case (which was affirmed by this Court, 247 U. S. 402, but later disapproved in *Nye* v. *U. S.*, 313 U. S. 33), Mr. Justice Holmes had this to say in his dissenting opinion (at p. 423):

> "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessity of the case 'to insure order and decorum in their presence' as it is stated in Ex Parte Robinson, 19 Wall. 505."

The Possible Effect of these Contempt Judgments upon the Bar and the Right to the Assistance of Counsel

The expansion of the contempt power made by the decision below establishes a dangerous precedent. It threatens the right of the American people to be represented fearlessly and vigorously by counsel. As Judge Clark pointed out in his dissent below (III R. 117):

> "* * * we cannot afford to overload the sacred responsibility of providing adequate defense for all to the point where it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the constitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job."

Is it not clear that to uphold the procedure followed in the present case must have serious consequences for the effectiveness of counsel? If the ruling of the Trial Judge is sustained, an attorney could never know whether the statements made by him during the course of a trial might

not at some future time lay the foundation for the summary infliction upon him of an enormous punishment. He would inevitably be led to make certain above all else that a Judge be favorably disposed towards him, lest he be faced —without even the opportunity of being heard—with imprisonment for something he had considered at the time it was done or said to be entirely innocent and proper.

Moreover, an attorney associated with others in the course of a trial of a number of defendants would find himself at a particular disadvantage. He could never be sure that a Judge might not conclude that he had participated in an agreement with other counsel to obsfruct justice as a result of conduct during a trial without giving him the slightest opportunity to deny such agreement. He would have to be constantly on guard in his cooperation with his co-counsel. Far from being "untrammeled" in his actions, he would necessarily be beset with doubts and suspicions as to the motives of his associates and as to how someone else might interpret those motives.

One cannot render effective assistance where he operates under a cloud of fear of future personal consequences because of what he advocates or the manner in which he does so. And this factor has its greatest importance in cases which involve issues of deep significance which arouse tremendous public excitement, where the defendants are the objects of hostility of those in power. It is here where the pressure would be greatest. Yet is here, if our institutions are to survive, that the greatest encouragement, the greatest latitude, should be given to counsel.* It is here

* The President of the United States has recently felt called upon to express grave concern: "The Bar has a notable tradition of willingness to protect the rights of the accused * * * (But) I believe that most Americans recognize how important it is to our traditions of fair trial that there be adequate representation by competent counsel. Lawyers in the past have risked the obloquy of the uninformed to protect the rights of the most degraded. Unless they continue to do so in the future, an important part of our rights will be gone." (Letter to American Bar Association dated September 1, 1951, reprinted in Bar Bulletin of New York County Lawyers Association, Vol. 9, No. 3, pp. 22, 32.)

that Judges—not counsel—must demonstrate the greatest fortitude and self-restraint. Now, perhaps more than ever before, it is vital that judicial action be calm, impersonal, consonant with due process, and procedurally discreet.*

We cannot afford to return to the practices which resulted in the disbarment of Zenger's counsel (see *Trial of John Peter Zenger*, 17 How. St. Tr. 675) and the mistreatment of lawyers who defended those accused under the Alien and Sedition Acts. The correct course in this case was that advised in Judge Clark's dissenting opinion below:

> "I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly" (III. R. 117).

What the denial of due process, the enthronement of dictatorial authority in any branch of government produces is silence and sycophantism. What affirmance of the decision in this case will deter is participation by attorneys in any case in which they are likely, because of the activities of the persons whom they represent, to be faced with a hostile Judge, a Judge who will ascribe to them the motives he attributes to their clients and who will give them no opportunity for refutation. And those who do participate will be deterred from performing their duty to their clients as it should be performed, from proceeding in the forthright and fearless manner that the traditions of the Bar

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* See comments on this case in 60 Yale L. J. 1: Lawyer Troubles in Political Trials; 2 Stanford Law Review, 763: Summary Contempt: A Sword or a Shield?; 99 University of Pennsylvania Law Review 540 (note). For an expression of the concern of the English Bar, see Whitty, the *Hallinan* case, 14 Modern Law Review 89 (London, January 1951), also noting that contempt sentences against attorneys are virtually non-existent in English courts at present.

prescribe, and that the fulfillment of the Sixth Amendment demands.

CONCLUSION

The orders of conviction should be reversed.

Respectfully submitted,

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* "The Bar, if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, must be bold in defense, and if need be, bold in aggression." Inscription on tablet below the speakers' rostrum in the auditorium of the Association of the Bar of the City of New York, credited to Hon. Samuel J. Tilden, February 1, 1870.

"The conduct of the counsel for Fries merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty will never cease to flow to them, for they stood up against arbitrary conduct and oppression." Remarks of Mr. Rodney on behalf of the prosecution in The Impeachment Trial of Justice Samuel Chase (Report of the Trial, p. 258, Baltimore, 1805).